IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1777

BREWERY DRIVERS AND HELPERS LOCAL UNION NO. 133, Affiliated With The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

GREY EAGLE DISTRIBUTORS, INC., et. al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

JOHN P. EMDE
FRED LEICHT, JR.
611 Olive Street—Suite 1950
St. Louis, Missouri 63101
(314) 621-5070
Attorneys for Respondents

Of Counsel
ARMSTRONG, TEASDALE,
KRAMER & VAUGHAN

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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STATEMENT OF THE CASE

Introduction. Petitioner's statement of the alleged "Question Presented" is utterly distorted, and belies the true nature of this case. Significantly, the petitioning Union originally pleaded at the trial level that arbitration was *not* required, and sought monetary relief from the court. Then, for the first time on appeal, apparently realizing how ludicrous its alleged Section 301 claim was, the Union piously preached the importance of

arbitrating industrial disputes, and as an alternative remedy, belatedly offered to arbitrate existing issues. Yet, confusingly, in its Reply Brief to the Eighth Circuit, the Union strenuously argued that it was not required to arbitrate any existing issues under the collective bargaining agreement that it asserts was in effect at the time of the alleged breaches by the employers. The Union sought the alternative arbitration remedy for the first time on appeal under the new collective bargaining agreement, not even in effect at the time of the dispute between the parties.

Thus, contrary to the representations in the Union's Petition before this Court, it has been Respondent Employers that have consistently asserted the importance of utilizing the available arbitration provisions to avoid industrial strife, rather than for the parties to resort to a test of economic strength through strike or lockout. It is patently ridiculous for the Union to have suggested arbitrability of alleged breaches of an expired contract for the first time on appeal, after the Union had opted to strike rather than to pursue arbitration. Indeed, the arbitration provision of the expired Labor Agreement specifically provided that there could be no strike while a matter was pending arbitration. If that contract had continued in existence after April 12, 1976, such provision would clearly have prevented the Union from calling the strike in 1976. The Union cannot have the best of two worlds by having elected to call a strike, thereby putting economic pressure upon the Employers, and then years later, "graciously" offering to have a second bite at the apple by seeking to have an arbitrator award "damages" for alleged breaches of contract.

Because the Union has attempted to change the nature of this case on appeal, the statement of the case contained in the petition for Writ of Certiorari does not adequately set forth all that is material to the consideration of the true nature of the case. Rather than supplement each and every omission in the

petitioner's statement of the case, and in an effort to present this Court with a clear and accurate statement of all that is material to the consideration of the actual question presented, Respondents shall set forth their own concise statement of the case.

The Facts as Pleaded Leading to Strikes Called by the Union. The petitioning Union and the various Respondent Distributors, bargaining together as The St. Louis Beer Wholesalers Association, commenced to negotiate in January, 1976, for a possible revision or replacement of labor agreements which were to expire effectively as of March 1, 1976. The parties continued to bargain beyond the stated termination date, and the employees continued to work through early April of 1976 under the terms of the 1973-76 Agreement.

Prior to April 7, 1976, the Union called a strike against Respondent Lohr Distributing Company, Inc., and established pickets at such Distributor. On April 7, 1976, Distributor Lohr demanded that the strike cease, and that the parties proceed to arbitration of any and all disputes that the Union alleged might exist concerning the interpretation or application of the terms of the then still existing Labor Agreement. The Union did not agree to this arbitration request, and indeed has pleaded that arbitration was not required under the 1973-76 Labor Agreement. In fact, the Union pleaded that the Court, and not an arbitrator or any other forum, should resolve the dispute.

By separate letter from the various Distributors to the Union, dated April 8, 1976, the Distributors quoted the "Termination" provision of the 1973-76 Agreement, and notified the Union that each individual Distributor had concluded that it was not probable that further negotiations would result in an Agreement. Each Distributor further notified the Union that it was terminating the collective bargaining agreement as of April 12, 1976, pursuant to the terms of the contract language,

and that the terms of the Agreement would no longer continue in full force and effect subsequent to such date.

The Union, contrary to the terms of the collective bargaining agreement itself, attempted to "reject" the terminations. The Union further notified the St. Louis Beer Wholesalers Association that it was continuing to strike "certain Employers in the Association" for breach of various labor agreement provisions, but that "those strikes have no bearing upon or relevancy to the economic and working conditions at issue in the current negotiations."

In its pleadings, the Union alleged that at approximately 4:00 P.M. on Friday, April 9, 1976, the Distributors (except Lohr), ordered employees to load delivery trucks to 250 cases, rather than 210 cases as allegedly provided in Article XIX of the 1973-76 Labor Agreement. The Union further alleged that on April 9, 10, and 11, the Union notified its members to refuse to operate any delivery trucks which contained more than 210 cases per driver, and to refuse to work and leave the employers' premises if they were ordered to undertake deliveries of over 210 cases per load. *Prior to* the normal starting hours on Monday, April 12, 1976 the Union had called strikes against all Distributors There was no allegation that any Distributor ordered a *delivery* of a load in excess of 210 cases per driver at any time prior to the strikes by the Union that commenced on April 12, 1976, prior to normal starting hours.

The strikes by the Union continued until June 28, 1976, when a new three year Labor Agreement was agreed upon and ratified. The Union members returned to work at that time. In the suit, the Union sought damages from the Association and the Distributors in order to compensate individual union members for lost wages and fringe benefits incurred during the eleven (11) weeks strike that was called by the Union.

The National Labor Relations Board Proceedings. The Union filed an unfair labor practice charge against the Association on April 9, 1976, prior to the time that the Union alleged that any Distributor ordered any employees to allegedly "overload" delivery trucks in claimed violation of the 1973-76 Labor Agreement. The sole asserted basis for the charge was that the Association had purportedly violated its *bargaining* obligation under the National Labor Relations Act by sending copies of its final proposal directly to individual employees in a form that was allegedly different from the final proposal presented to the Union negotiating committee.

The Regional Office of the National Labor Relations Board investigated the charge, but entered no findings. Instead, based upon information provided by the Union without any hearing, the Regional Office eventually indicated that there could be sufficient grounds, not as originally charged by the Union, but at least to pursue further proceedings to determine whether the *Association* committed a *bargaining* violation by implementing changes in the delivery load limits without first bargaining to impasse on such issue. The parties entered into a "Settlement Agreement" in November, 1976, long after the strike had ended, which contained a "Non-Admission Clause." It did *not* provide for back pay to any employee, nor damages to the Union or its members. The Notice posted pursuant to this Settlement related solely to a bargaining in good faith requirement under the Act, made no reference to any separate contractual duties or responsibilities, and contained no statement to even imply that the strike called by the Union had been converted into an unfair labor practice strike rather than the economic strike that it was.

The Decision of the District Court. The District Court held that the pleaded facts and supporting documents demonstrated that the 1973-76 collective bargaining agreements were properly terminated as of April 12, 1976 by the Distributors, that the

Union called strikes against the Distributors prior to the normal starting time for work on April 12th, and that the mere loading of up to 250 cases on trucks prior to that time clearly did not constitute contractual breaches. Thus, the Court dismissed the action, noting that it was immaterial whether the basis of dismissal would be characterized as a dismissal for lack of jurisdiction, or as a case in which the pleaded facts were sufficient to establish summary judgment for the Distributors and the Association.

Decision by the Eighth Circuit. On appeal, the Union stated that the sole issue was:

> "Has the Union pleaded an actionable claim of breach of a viable labor agreement by the Companies?"

As a subsidiary issue, the Union asked the Court to consider the effect of the disposition of the unfair labor practice charge, pursuant to the Settlement Agreement. The Eighth Circuit found it unnecessary to determine whether the District Court properly dismissed the complaint on the grounds set forth in the District Court opinion, finding that the complaint of the Union failed to state a cause of action for another reason. The Eighth Circuit held that the Union could not properly bring an action for wages lost by its members during the strike called by the Union to protest an alleged breach of the collective bargaining agreement, because the Union had not first agreed to submit the dispute to arbitration pursuant to the arbitration provisions of the collective bargaining agreement, nor had the employers rejected any offer to arbitrate.

QUESTIONS PRESENTED

Respondents submit that this case is easily resolved as a matter of contract, under established principles relating to Section 301(a) cases (29 U.S.C. § 185). The District Court did so, not even reaching various other defects in petitioner's complaint. The issue to be determined then, certainly not a novel one, is:

> Whether the Pleadings Demonstrate That Collective Bargaining Agreements Were No Longer in Effect Between the Union and the Individual Beer Distribtuors at the Time of the Alleged Breaches by Various Distributors, and Whether, in Any Event, the Pleadings Demonstrate That No Contractual Breaches Occurred Upon the Union Can Base a Section 310(a) Claim.

If the essential basis of the Eighth Circuit's decision were deemed to be the issue involved, then it too, presents no controversial or significant point of law. That issue is:

> May a Union Properly Bring a Section 301(a) Action Seeking Wages Lost by Its Members During a Strike Called by the Union to Protest an Alleged Breach of the Collective Bargaining Agreements, Without Having First Offered to Submit the Dispute to Arbitration Pursuant to the Applicable Arbitration Provision, and Having Had That Offer Rejected by the Employers, Before Resorting to Strike Action?

REASONS FOR NOT GRANTING THE WRIT

1. This Case Involves the Simple Question as to Whether Petitioning Union's Pleadings and Supporting Documentation Demonstrate That No Contractual Breaches Occurred Upon Which to Base a Section 301(a) Claim. In Any Event, the Eighth Circuit's Decision Merely Follows the Previous Enunciations of the Supreme Court Stressing the Importance of Reducing Industrial Strife, Requiring a Union to Utilize the Available Arbitration Process Rather Than Resorting to Strike, and the Decision Applies Those Principles to the Facts of This Case.

Courts have often noted that the main congressional purpose in authorizing breach of contract suits pursuant to Section 301, 29 U.S.C. §185, was to promote collective bargaining that ends with agreements *not to strike. Textile Workers v. Lincoln Mills,* 353 U.S. 448, 453 (1953). Reiterating such purpose once again in *William E. Arnold Co. v. Carpenters,* 417 U.S 12, 18 (1974), this Court further stated:

> "The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses"

In spite of this purpose, here the Union, while claiming that a contract still existed, rejected both the available grievance and arbitration procedure, and any immediate attempt to use the judicial process pursuant to Section 301. Instead, it voluntarily chose to use the economic weapon of the strike. Having elected this economic "remedy", the Union's position that it can also sue under Section 301 for damages due to loss of wages as a result of the strike, is patently ridiculous.

If the Union considered the mere loading of the trucks by a distributor to be a breach of contract, and assuming that the contract still existed, the Union could have demanded arbitration of the issue. If the Union believed that arbitration of the load limit issue was not mandatory unless agreed to by all distributors, then the Union could have commenced a Section 301 suit at that time for alleged breaches of contract, or have utilized any other contractual remedy. The Union sought neither arbitration or court relief.

Instead, the Union called a strike against all distributors. Article XV, Section 3 of the 1973-76 Agreement specifically provides that "if neither party demands arbitration, . . . either party preserves the right to exercise its economic power in support of its demands." Thus, if the Union had a right to strike rather than proceeding to arbitration, it was clearly calling such strike pursuant to that provision. Having elected to proceed with that contractual remedy, the Union cannot properly subsequently pursue a Section 301 action in which its sole claim for damages is for loss of wages resulting from a strike that it elected as its remedy.

It is undisputed that the Union struck Respondent Lohr Distributing Co., Inc. and certain other distributors *prior* to the time that the Union asserts that certain distributors violated the 1973-76 collective bargaining agreement. As a result of the strike against Lohr, by letter dated April 7, 1976, Lohr informed the Union that the Company was demanding "arbitration of any and all disputes, differences or disagreements you allege to exist between the union and the company concerning the interpretation or application of the terms of our present Labor Agreement." The letter further stated that the strike against the company was in violation of the Labor Agreement, and demanded that the strike must end immediately. The Union never agreed to arbitrate, thereby violating the grievance and arbitration clause of the Labor Agreement.

Assuming arguendo, that the old Labor Agreement continued to exist beyond April 12th, then the Union should have sub-

mitted any questions or breach of contract to arbitration *at that time*, as had been demanded by Lohr Distributing Co. It is well-established that parties must exhaust available contractual arbitration remedies before being authorized to maintain a Section 301 action. Indeed, this Court has also ruled that absent an explicit expression of an intention to negate any implied no-strike obligation, an agreement to arbitrate and the duty not to strike should be construed as having coterminous application. *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974).

In its petition to this Court, the Union cites *Nolde Brothers, Inc. v. Local No. 358 Bakery Workers, etc.*, 430 U.S. 243 (1977), for the proposition that the duty to arbitrate a dispute can extend beyond termination of the existing labor agreement. That case is obviously inapplicable here, and certainly is not in any manner inconsistent with any pronouncement by the Eighth Circuit in this case. Indeed, it has been Respondents who have asserted that arbitration under the 1973-76 contract was mandatory, and the Union pleaded and argued to the contrary. Now, having disavowed arbitration, the Union attempts to change its position in mid-stream, and argue for arbitration after having utilized a work stoppage to its advantage.

The Union has cited no cases, nor can it, in which a union has successfully maintained a Section 301 action for damages allegedly resulting from a strike that it called. The very purpose of a Section 301 suit is subverted if a union could call a strike as a result of an alleged breach of contract by an employer, and then seek the additional remedy of recovering damages allegedly due to the very strike that the union elected to call. No decision of this Court, nor the federal common law of labor relations, authorizes such a dual, inconsistent, and self-defeating system of alternative remedies.

Clearly, the decision of the Eighth Circuit is completely consistent with decisions of this Court, stressing the importance of utilizing the available arbitration procedure in lieu of resorting to work stoppages. The Petition for the Writ of Certiorari should be denied!

2. **The Eighth Circuit's Decision Is Not in Conflict With the Decisions of Any Other Circuit.**

In an attempt to conjure up a non-existent "conflict in the circuits", petitioning Union has cited *United Steelworkers v. NLRB*, 3 Cir., 530 F.2d 266 (1976). But the *Steelworkers* case is completely inapplicable here. First, such case was *not* a Section 301 case, but rather reached the courts on petition for review and cross-application for enforcement of an order of the National Labor Relations Board. Secondly, and even more importantly, contrary to the circumstances here, the events and disputes involved in the *Steelworkers* case did not arise in the context of negotiations for a new agreement after expiration of an existing agreement, but rather in the midst of the term of a labor agreement. The Board had ruled that a strike by the union in breach of a no-strike clause, justified the company's unilateral cancellation of the existing labor agreement, the refusal of the company to even recognize the union, and the termination by the Company of all of the striking employees, even though the strike was in retaliation to an initial unfair labor practice by the company. The Third Circuit certainly did not condone the strike by the union, but stated that the Board should not have *automatically* approved the drastic retaliatory action taken by the company in terminating its relationship with the union on the ground that the initial unfair labor practice by the company was of a "non-serious" nature. Instead, the court remanded the case to the Board for reconsideration in light

of other, less drastic and more peaceful remedies, that may have been available to the company.

Here, of course, the Distributors did *not* terminate any of the striking employees, did *not* refuse to continue to recognize the Union, continued bargaining with the Union until a new agreement was reached, and terminated the old labor agreements previously in accordance with the available contractual termination provisions. The Distributors, unlike the company in the *Steelworkers* case, did *not* terminate the contracts as retaliatory acts based upon the concept of material breach of contract by the Union, rendering the agreement null and void. Obviously, the material factors here are significantly different than those in the *Steelworkers* case.

Interestingly, the *Steelworkers* case has been cited for the principle that an unfair labor practice by an employer does *not* give a union the right to strike in violation of a labor agreement. See, *Peabody Coal Co. v. Local U. No. 1670,* E.D. Ill. 416 F. Supp. 485, 495 (1976). Of course, the Third Circuit itself has ruled, after it decided the *Steelworkers,* that employees who are terminated for engaging in a strike in violation of a no-strike clause in the collective bargaining agreement are *not* protected by the provisions of the National Labor Relations Act guaranteeing employees the right to engage in concerted activities, including strikes. See, *Suburban Transit Corp. v. NLRB,* 3 Cir. 536 F.2d 1018 (1976).

Thus, it is clear that the *Steelworkers* case has no applicability here, and the Eighth Circuit very consistently noted that: "We have no quarrel with the Third Circuit's (*Steelworkers,* supra) decision." Even a casual reading of two other Third Circuit cases cited by Petitioner (*Controlled Sanitation Corp. v. District 128, etc.,* 524 F.2d 1324 (1975), and *Childrens Rehab.*

Ctr., Inc. v. Service Employees, Local 227, 503 F.2d 1077 (1974)) demonstrates that there is absolutely no conflict between the circuits on any applicable issue. Indeed, the Eighth Circuit cited such Third Circuit decisions to demonstrate the Union's duty to have sought arbitration rather than to strike, also citing such established decisions of this Court as *Drake Bakeries v. Local 50,* 370 U.S. 254 (1962), and *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960). Obviously, the Eighth Circuit's decision is totally consistent with both the decisions of other circuits, and the decisions of this Court.

CONCLUSION

The Petition for a Writ of Certiorari is totally void of any basis for bringing the decision of the Eighth Circuit before this Court for review. The Supreme Court has frequently enunciated the value and necessity of utilizing the arbitration process in lieu of the industrial strife resulting from strikes and lockouts. The Eighth Circuit merely applied these well-established principles to the facts of this case. Neither the Third Circuit, nor any other circuit, has opposed these principles. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. EMDE

FRED LEICHT, JR.
611 Olive Street, Suite 1950
St. Louis, Missouri 63101
314-621-5070
Attorneys for Respondents

Certificate of Service

I hereby certify that on this 22nd day of June, 1979, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were personally delivered to Jerome J. Duff, Esq., 1139 Olive St., Suite 302, St. Louis, Missouri 63101, counsel for petitioners.

. . . . . .